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IN THE
Supreme Court of the United States

OCTOBER TERM, 1938.

No. [REDACTED] 19

OKLAHOMA PACKING COMPANY, FORMERLY WILSON
& CO., INC. OF OKLAHOMA, AN OKLAHOMA CORPORATION,
AND WILSON & CO., INC. OF OKLAHOMA, a Delaware corporation,

Petitioners,

vs.

OKLAHOMA GAS AND ELECTRIC COMPANY, A CORPORATION;
OKLAHOMA NATURAL GAS COMPANY, A CORPORATION;
W. T. PHILLIPS, JR., H. J. CRAWFORD, J. V. RITTS,
LEONARD C. RITTS, R. W. HANNAN, A. W. LEONARD,
AND R. C. SHARP, THE DIRECTORS OF THE OKLAHOMA
NATURAL GAS COMPANY, A DISSOLVED CORPORATION;
AND OKLAHOMA NATURAL GAS CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE TENTH
CIRCUIT.

W. R. BROWN,
PAUL WARE,

Counsel for Petitioners.

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AND OKLAHOMA NATURAL GAS CORPORATION.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TENTH CIRCUIT.

*To The Honorable Justices of the Supreme Court
of the United States:*

The petition of Wilson & Co., Inc. of Oklahoma and Oklahoma Packing Company, petitioners in the above captioned case, respectively shows:

STATEMENT OF THE MATTER INVOLVED.

An order of the Oklahoma Corporation Commission, affirmed by the Supreme Court of the State of Oklahoma, directing Oklahoma Natural Gas Company, a public utility, to serve fuel gas to Wilson and Company, an industrial consumer, at its voluntary and previously published rate, has been held invalid by a decree of the United States District Court, which enjoined the enforcement of that order and also an action at law in the Oklahoma court to recover the overcharges collected subsequent to the date of the Commission's order. This decree was affirmed by the Tenth Circuit Court of Appeals, and is in direct conflict with the law of the State of Oklahoma as previously determined by its Supreme Court, and, in effect, constitutes an assumption of appellate jurisdiction by the Federal district court to review a judgment of the Supreme Court of Oklahoma.

A further matter involved is the objection to the venue of the District Court over petitioner, the Delaware corporation, which promptly appeared specially and objected on the ground that, in this suit, which is based on a federal question, it could not be sued in the district in which it was not an inhabitant (R. 38). The Circuit Court of Appeals affirmed (R. 218, 214) the judgment of the District Court overruling the objection (R. 59, 65, 118).

The opinion of the Circuit Court of Appeals appears in the record (R. 207) and in the reports. *Oklahoma Packing Co., et al. v. Oklahoma Gas & Electric Co., et al.*, 100 F. (2d) 770.

The opinion of the District Court appears only in the record (R. 97).

The controversy between the parties commenced with the

complaint of Wilson and Company (R. 12) against Oklahoma Natural Gas Company and Oklahoma Gas & Electric Company, public utilities, before the Corporation Commission of Oklahoma, wherein Wilson and Company charged that it operated a packing plant outside of the city limits of Oklahoma City and about 450 feet from the pipe line of the general system of Oklahoma Natural; and that because of an agreement between the two utility companies, it was compelled to pay Oklahoma Gas & Electric Company a rate five cents in excess of that charged other industries similarly situated. After full hearing of the evidence, the Commission made its findings of fact one of which was that the Oklahoma Natural Gas Company, under the circumstances, should be required to supply the Wilson plant with similar quantities of gas to that supplied other institutions located along its pipe line outside of incorporated cities, upon the same terms and conditions (R. 24-25). The Commission thereupon entered its Order No. 3388 requiring that utility company to serve Wilson and Company with fuel gas at its industrial rate (R. 16). That rate was not and is not in dispute since it had been previously and voluntarily adopted by the Oklahoma Natural for industrial users located on its general system outside of the city limits (R. 91, 122, 133, 135).

Upon appeal from the Commission's Order No. 3388 to the Supreme Court of Oklahoma, the Oklahoma Natural and the Oklahoma Gas and Electric Companies challenged the validity of that order on the ground that it was not supported by the evidence, contrary to law, and that it was a taking of property without due process of law. The Oklahoma Supreme Court affirmed the order and specifically disposed of each of these contentions. *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 146 Okla. 272. The utility companies failed to take an appeal from that decision to the United States Supreme Court.

The same gas companies thereafter filed the present bill (R. 1) in the United States District Court and assailed the validity of Order No. 3388, as affirmed by the Oklahoma Supreme Court, upon the same grounds urged by them in the State Supreme Court (R. 7-8) and sought to enjoin the Wilson companies and state officers from enforcing that order. The Wilson companies answered that the decision of the Supreme Court of Oklahoma was *res judicata* of all issues in this suit and that the Federal District Court had no jurisdiction to review that judgment (R. 51, pars. o and p, R. 66). The utility companies alleged that the validity of the order had not been judicially determined (R. 7). The bill further sought to enjoin (R. 8) an action at law previously filed in the Oklahoma Court by Wilson and Company against the Oklahoma Gas & Electric Company to recover the excess charges paid the latter company for gas (R. 26). Wilson and Company's position as to this part of the bill was that, under section 265, Judicial Code, the *in personam* action in the State court (so held by the three judge court (R. 78); *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 6 F. Supp. 893, 895) is not within any exceptions to that section and cannot be enjoined by a Federal District Court.

The Circuit Court of Appeals has affirmed the judgment and decree of the District Court which declared invalid the Commission's Order No. 3388 affirmed by the Oklahoma Supreme Court on the grounds alleged (R. 97), and enjoined the further prosecution of the action in the State Court (R. 111). An injunction against state officers was denied.

In holding the order invalid the Circuit Court of Appeals (R. 214) and the District Court (R. 96, 105) followed language in a former opinion of the said Court of Appeals (*Oklahoma Gas & Electric Company v. Wilson & Co., Inc.*, 54 F. (2d) 596) which stated that the Supreme Court of

Oklahoma acted only legislatively in reviewing orders of the Oklahoma Corporation Commission. The language in that case has been expressly held by the Supreme Court of Oklahoma to be an incorrect statement of the law of that State. *Oklahoma Cotton Ginners' Ass'n. v. State*, 174 Okla. 243 at 251. The settled law of Oklahoma as announced in the *Ginners'* case and followed in the law action now enjoined, is that decisions of the Oklahoma Supreme Court on appeals from orders of the Corporation Commission affecting public utilities, such as gas companies, constitute a judicial determination of the questions involved. *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 178 Okla. 604, at 605.

The prior suit reported in 54 F. (2d) 596 was similar to the present one (R. 188) and the Tenth Circuit Court of Appeals reversed a decree of the District Court dismissing the bill. Upon remand, a three judge court was convened which held it was without jurisdiction. The bill was dismissed without prejudice and the present suit filed.

The present case has been before this Court on an appeal from the District Court, three judges sitting, and the only question decided was that a three judge court had no jurisdiction. *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U. S. 386.

JURISDICTION.

The date of the decision and judgment of the Circuit Court of Appeals for the Tenth Circuit is December 19, 1938 (R. 218).

The jurisdiction of the Court is invoked under Section 240(a) of the Judicial Code as amended by an Act of February 13, 1925.

QUESTIONS PRESENTED.

The following questions are presented:

1. Whether the review and decision by the Supreme Court of Oklahoma affirming Order No. 3388 of the Corporation Commission affecting public utilities was a judicial determination of the validity of the order under the laws of Oklahoma and *res judicata* of all the issues in the instant suit.

2. Whether the United States District Court is bound by the decisions of the Supreme Court of Oklahoma, which is the highest court in that state, in the construction of the Constitution and laws of the State of Oklahoma as to the character of the functions exercised by it in reviewing orders of the Corporation Commission affecting public utilities.

(a) Under the above the incidental question is raised whether the Tenth Circuit Court of Appeals and the District Court should have followed the decision of the Supreme Court of Oklahoma even though an earlier decision of that Circuit Court of Appeals (54 F. (2d) 596) is in direct conflict with those of the Supreme Court of Oklahoma.

3. Whether the Federal District Court is prohibited by section 265, Judicial Code, from granting an injunction against the further prosecution of the *in personam* action at law in the State Court to recover the overcharges collected by the Oklahoma Gas & Electric Company from Wilson & Co.

4. Whether the United States District Court, Western District of Oklahoma, has venue in this civil suit based on a federal question over petitioner, a Delaware corporation, qualified to do business in Oklahoma, with a usual place of business in that district, when petitioner first appeared specially and objected to being sued in that district on the ground that it was not an inhabitant thereof, which objection has never been waived.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The following reasons are relied on for allowance of the writ:

1. The Tenth Circuit Court of Appeals, in determining that the Supreme Court of Oklahoma functioned legislatively in reviewing Order No. 3388 of the Corporation Commission affecting a public utility, decided an important question of construction of the Constitution and laws of the State of Oklahoma in a way which is in direct conflict with the applicable decisions of the Supreme Court of Oklahoma more particularly shown in *Oklahoma Cotton Ginners' Ass'n v. State*, 174 Okla. 243, and *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 178 Okla. 604.

2. The Tenth Circuit Court of Appeals, in determining that Section 265, Judicial Code did not apply to this suit, decided a federal question in a way which is in conflict with the applicable decisions of this Court more particularly shown in *Hill v. Martin*, 296 U. S. 393, and *Grubb v. Public Utilities Com. of Ohio*, 281 U. S. 470.

3. The Tenth Circuit Court of Appeals, in determining that petitioner, a Delaware corporation, by complying with the provision of Oklahoma law respecting the domestication of foreign corporations consented to be sued in the United States District Court for the Western District of Oklahoma, decided a federal question in a way which is in conflict with the applicable decisions of this Court, and particularly *Southern Pacific Co. v. Denton*, 146 U. S. 202.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this

Honorable Court, directed to the United Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record in proceedings herein; and that the decree of said Circuit Court of Appeals be reversed by this Honorable Court and your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

W. R. BROWN,

PAUL WARE,

Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION.

For the statement of the case and the grounds upon which the jurisdiction of this Court is invoked, reference is made to the preceding petition. The Tenth Circuit Court of Appeals erred in affirming the decree of the District Court for the reasons set forth in the preceding petition.

I.

THE DECISION OF THE SUPREME COURT OF OKLAHOMA AFFIRMING ORDER NO. 3388 OF THE CORPORATION COMMISSION WAS JUDICIAL AND IS RES JUDICATA OF ALL THE ISSUES IN THE INSTANT CASE.

In considering how the Supreme Court of Oklahoma functions, whether legislatively or judicially, upon reviewing orders of the Corporation Commission, the distinction between orders affecting "transportation and transmission companies" and those affecting "public utilities" such as gas companies must be kept clear. Where the order affects a "transportation and transmission company" the Supreme Court of Oklahoma may review the Commission's orders legislatively under the Constitution of Oklahoma. Where the order affects "public utilities," such as "ginners" and "gas companies," which are not included within the Constitutional definition of "transportation and transmission companies," that court only reviews such orders judicially. In a case where the order affected *ginners*, the Oklahoma Supreme Court reviewed carefully the decisions, the Constitutional and statutory provisions of the State pointing out this distinction and decided that it reviews orders affecting public utilities only judicially. *Oklahoma Cotton Ginners' Ass'n. v. State*, 174

Okla. 243. Likewise, in the action to recover excess charges, the Court followed its decision in the *Ginners'* case and held that on the appeal from the Corporation Commission (146 Okla. 272) it had reviewed Order No. 3388 judicially. *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 178 Okla. 604.

Independently of that holding, however, a brief reference to the original review of the Commission's Order No. 3388 by the Oklahoma Supreme Court (*Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 146 Okla. 272) will show convincingly that it was judicial.

The Corporation Commission is a tribunal wherein the gas companies could and did present all the evidence touching their rights. When the Commission found that Wilson and Company was being charged a rate in excess of the previously established rate for industrial consumers similarly situated, it fully investigated and declared the liability of the gas company on present or past facts and under the laws then existing. It was merely ordering the gas company to cease its discrimination. *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210.

The only questions raised by the gas companies, in their appeal from that order to the Supreme Court of Oklahoma, were that the order was not supported by the evidence and contrary to the law, and the order violated the Constitution of Oklahoma and the Fourteenth Amendment to the Constitution of the United States. The Supreme Court decided, after a careful study of the evidence and findings of fact by the Commission, that the evidence was sufficient to sustain the findings and to warrant the Commission in making the order. The Supreme Court then held that the order was not contrary to law, and that the gas companies were not denied due process of law. *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 146 Okla. 272.

The Supreme Court of Oklahoma was independently determining the right of the parties on the record made before the Commission as finally presented on appeal. The questions called for a purely legal determination. That the court was not making any legislative order such as rates for the future. It merely affirmed an order of the Commission commanding a public utility to render or perform public service such as was its clear legal duty to perform. The questions raised quite clearly show that they were appropriate ones for judicial decision, within the rule announced in the *Ginners' case, supra*, and *Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266.

The gas companies made no effort to have the federal constitutional question reviewed by this court within the time allotted for applying for such a review. That this was the only remedy left open to them was both firmly established and well known to them at the time of the decision in the *Wilson case*. The following cases involved orders of the Corporation Commission affecting gas companies (three involved respondent) which had been reviewed by the Supreme Court of Oklahoma and review was either had or applied for in this Court:

Oklahoma Natural Gas Co. v. State, 258 U. S. 234; a review of 78 Okla. 5.

Oklahoma Natural Gas Co. v. State, 274 U. S. 721, denying writ of certiorari to review 110 Okla. 297.

City of Pawhuska v. Pawhuska Oil & Gas Co., 250 U. S. 394; a review of 64 Okla. 214.

City of Sapulpa v. Oklahoma Natural Gas Co., 258 U. S. 608, dismissing writ of error from 79 Okla. 196.

Instead of seeking review in this Court, the gas companies filed this suit in the Federal District Court to en-

join the enforcement of the order as well as the suit in the State court on the ground that the order was invalid for the same Constitutional reasons which they had urged on the appeal to the Supreme Court of Oklahoma. The Supreme Court of Oklahoma had resolved the questions raised in this suit against the gas companies for it both reviewed and affirmed Order No. 3388 and specifically disposed of the constitutional questions. Except for the question raised under the Fourteenth Amendment to the Constitution of the United States the questions raised in the State Court were ones of local law only and the solution of these questions should have been accepted by the Federal Court. As to the Federal question it had been judicially determined adversely to the contentions of the gas companies, and the decision of the Supreme Court of Oklahoma was reviewable only upon application to this Court.

Since the parties and the subject matter in the instant suit are the same as those before the Corporation Commission and the Supreme Court of Oklahoma, the latter court's judgment upon the merits in that proceeding is *res judicata* in this suit as respects all matters actually presented to defeat Order No. 3388 and also as respects any other available matter which might have been presented to that end. *Grubb v. Public Utilities Comm. of Ohio*, 281 U. S. 470.

The Circuit Court of Appeals and the District Court completely disregarded the decision of the Supreme Court of Oklahoma in the *Ginners* case, *supra*, and the two *Wilson* cases, *supra*, and relied upon the earlier opinion of the Tenth Circuit Court of Appeals in *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 54 F. (2d) 596. They refused to consider these cases even though the State Supreme Court in the *Ginners* case, by specific reference to

54 F. (2d) 596, held that the statement in the latter case as to how the Supreme Court of Oklahoma reviewed orders of the Corporation Commission affecting public utilities was not a correct statement of the law of Oklahoma. The *Ginnerys*' case and the second *Wilson* case (178 Okla. 604) were decided after the decision by the Circuit Court of Appeals in 54 F. (2d) 596. They expressed the law of the State of Oklahoma at the time the instant suit was before the District Court and the Circuit Court of Appeals. The federal courts should have followed the Oklahoma Supreme Court's construction of the Constitution and the statutes of the State of Oklahoma, even though the Circuit Court of Appeals had previously held to the contrary. *Messenger v. Anderson*, 225 U. S. 436; *St. Louis & S. F. R. Co. v. Quinette* (Okla. C. C. A. 8th), 251 F. 773.

II.

THE DISTRICT COURT WAS PROHIBITED BY SECTION 265, JUDICIAL CODE, FROM ENJOINING THE PROSECUTION OF THE ACTION IN THE STATE COURT.

The Tenth Circuit Court of Appeals has affirmed a decree of the District Court of Oklahoma permanently enjoining the Wilson companies, their officers, agents, and attorneys from further prosecuting a certain action at law brought by Wilson & Co., Inc., of Oklahoma, a Delaware corporation, against Oklahoma Gas & Electric Co., and its surety, Fidelity & Casualty Company of New York. The petition in the State Court (R. 26-35) shows that this was an *in personam* action to recover money damages. The first three counts are for breaches of supersedeas bonds which were filed in the Supreme Court of Oklahoma to supersede Order No. 3388 pending the appeal to that court. The amounts of those bonds cover the excess rate collected

by the Oklahoma Gas & Electric Co. The fourth cause of action is to recover the amounts paid for gas in excess of the lawful rate which is not covered by bonds set up in the three preceding counts.

The suit in the State Court was commenced about six months before the present injunction suit was filed in the Federal District Court. It has been held by the three judge district court in this suit that the action in the State Court, as well as in the Federal Court, were *in personam* actions and that the only thing sought to be accomplished in this equitable action was to enjoin the further prosecution of that action at law in the State Court. (R. 77-78; *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 6 F. Supp. 893.) It will be recalled that the request in this suit for an injunction against state officers was refused.

Section 265 of the Judicial Code prohibits the Federal District Court from enjoining the action at law in the State Court. It provides:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The Tenth Circuit Court of Appeals, however, has held that this section does not apply, for the reason that the injunction is against the parties and not against the State Court, citing *Steelman v. All Continent Co.*, 301 U. S. 278. The *Steelman* case is not applicable for the reason that it involved a proceeding in bankruptcy, which is specifically excepted in Section 265, and further that section was not under consideration.

Under Section 265, as construed by this Court, an injunction against the parties to a proceeding in a state court is the same as a stay of proceedings in that court. *Hill v. Martin*, 296 U. S. 393. Since the action at law in the Okla-

homa Court was not a case within one of the recognized exceptions to Section 265, it was error for the Tenth Circuit Court of Appeals to have affirmed the decree of the District Court enjoining the further prosecution of that action.

III.

VENUE.

The venue objection of petitioner, the Delaware corporation, was made under Section 51, Judicial Code, which provides:

... * * no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, * * * .

The company specially appeared and objected to the venue since the sole basis for the suit was under federal law and it was an inhabitant of Delaware. The objection was overruled and exception taken (R. 65) and again preserved in its answer (R. 66).

The only reason for overruling the objection was that the company had previously consented to be sued in Oklahoma county by filing with the Secretary of State an appointment of an agent (R. 187, Ex. 7) which was mandatory under the laws of Oklahoma (See Appendix) before a foreign corporation could do business in that state. The particular clause in the appointment upon which the Circuit Court of Appeals relied is as follows:

"Said company consents that all actions against it may be brought in the county in which the cause of action arose, as now provided by law." (R. 188.)

This clause has no application to this suit in the Federal Court for several reasons. In the first place, the appointment of the agent was filed December 7, 1932 or six months after this suit was filed on May 20, 1932. (R. 35.)

In the second place, the above clause only applies to actions in the state court and to construe the statutes of Oklahoma so as to compel the foreign corporation to surrender a right and privilege secured to it by the Constitution and laws of the United States would render the state law unconstitutional and void. *Southern Pacific Co. v. Denton*, 146 U. S. 202. The ruling of the Circuit Court of Appeals is in direct conflict with the *Denton* case.

Respectfully submitted;

W. R. BROWN,
PAUL WARE,
Counsel for Petitioners.

APPENDIX.

Section 43 of Article IX of the Constitution of Oklahoma is as follows:

“No corporation, foreign or domestic, shall be permitted to do business in this State without first filing in the office of the Corporation Commission a list of its stockholders, officers, and directors, with the residence and post office address of, and the amount of stock held by each. And every foreign corporation shall, before being licensed to do business in the State, designate an agent residing in the State; and service of summons or legal notice may be had on such designated agent and such other agents as now are or may hereafter be provided for by law. Suit may be maintained against a foreign corporation in the county where an agent of such corporation may be found, or in the county of the residence of plaintiff, or in the county where the cause of action may arise.” (2 Okl. Stats. 1931, p. 1474, § 13628.)

Section 130, Oklahoma Statutes 1931, provides:

“Every foreign corporation shall, before it shall be authorized or permitted to transact business in this State or continue business therein, if already established, by its certificate under the hand of the president and seal of the company, appoint an agent, who shall be a citizen of the State and reside at the state capitol, upon whom service of process may be made in an action in which said corporation shall be a party; and action may be brought in any county in which the cause of action arose, as now provided by law. Service upon said agent shall be taken and held as due service upon said corporation; and such certificate shall also state the principal place of business of such corporation in this State, with the address of the resident agent.” (1 Okl. Stats. 1931, p. 50.)